LIBRARY
SUPREME COURT, U. S.

FILED
AUG 5 1961
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 291.

CECIL DUNLAP and SAM POLLOCK,
Petitioners,

v.

THEODORE SPILKA,
Trustee in Bankruptcy,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

JOSEPH E. FINLEY,
METZENBAUM, GAINES, SCHWARTZ,
KRUPANSKY, FINLEY AND STERN,
700 Union Commerce Building,
Cleveland, Ohio,

MORTIMER RIEMER,
SMOOT AND RIEMER,
2141 Illuminating Building,
Cleveland, Ohio,
Attorneys for Petitioners.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

TABLE OF CONTENTS.

Opinions Below 1

Statement of Jurisdiction 1

Questions Presented 2

Constitutional Provision Involved 2

Statement of the Case 2

How the Federal Questions Were Presented 8

Reasons for Granting the Writ 9

The Importance of the Questions Involved Concerning Proper Due Process Standards for State Courts in Labor Injunction Contempt Cases Make It Imperative That This Writ Be Granted 9

(a) The Widespread Use of Injunctions in Labor Disputes in State Courts 9

(b) The Sweeping Scope of the State Restraining Orders 15

(c) Contempt Is a Frequent Proceeding in State Courts in Labor Injunction Cases 16

(d) The Applicability of Due Process Standards 18

1. The Federal Requirements 18

2. The Concept of Guilt as Personal 19

3. The Rule Against Vagueness 21

(e) Unregulated State Court Action Can Impose Great Restraints Upon the National Labor Policy 22

(f) The Great National Importance of the Issues Presented Overwhelmingly Supports the Granting of the Writ 24

Conclusion ---------- 27

APPENDICES:

A. Spilka, Trustee, Appellee, v. Retail Stores Employees Union, Local No. 880, et al., Appellants 28

B. Journal Entry of the Court of Appeals ---------- 29

C. Decision of the Court of Common Pleas ---------- 30

TABLE OF AUTHORITIES.

Cases.

Cass Farm Co. v. Detroit, 181 U. S. 396 ---------- 20

French v. Barber Asphalt Paving Co., 181 U. S. 324 ---------- 20

Garner v. Teamsters Union, 346 U. S. 485 (1953) ---------- 12

Green, In re, 172 Ohio St. 269 (1961) ---------- 13

Griffin v. Illinois, 351 U. S. 12 (1956) ---------- 14

Guss v. Utah State Labor Relations Board, 353 U. S. 1 (1957) ---------- 12

Hardin and Helber v. Kornmiller, et al., Court of Common Pleas, Hocking County, Ohio, No. 12194 11

Herndon v. Lowry, 301 U. S. 242 (1937) ---------- 20

International Longshoremen's Association v. Weaver, Court of Common Pleas, Cuyahoga County, Ohio, No. 749091 ---------- 11

Jordan v. DeGeorge, 341 U. S. 223 (1951) ---------- 20

Lamson Brothers Co. v. Retail Clerks Locals 128 and 633, Court of Common Pleas, Lucas County, Ohio, No. 184720 ---------- 11

Lanzetta v. New Jersey, 306 U. S. 451 (1939) ---------- 20

LaSalle's, a Division of R. H. Macy & Co. v. Retail Clerks Locals 128 and 633, Court of Common Pleas, Lucas County, Ohio, No. 184121 ---------- 11

Lederer Terminal Warehouse, Inc. v. International Brotherhood of Longshoremen, AFL-CIO, Court of Common Pleas, Cuyahoga County, Ohio, No. 708768 ---- 11

Liberal Market, Inc. v. Retail Clerks Local 1552, Court of Common Pleas, Montgomery County, Ohio, No. 118394 ---- 11, 17

Milkwagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287 ---- 25, 26

San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959) ---- 12, 22

Scales v. United States, 81 Sup. Ct. 1469 (1961) ---- 19, 20

Scull v. Virginia, 359 U. S. 344 (1959) ---- 21

Smith v. International Longshoremen's Association, Local No. 1317, Court of Common Pleas, Cuyahoga County, Ohio, No. 738780 ---- 11

State v. Local Union 5760, United Steel Workers, 172 Ohio St. 75 (1961) ---- 20

Swift & Co. v. United States, 196 U. S. 375 (1905) ---- 21

Tonawanda v. Lyon, 181 U. S. 389 ---- 20

United Brotherhood of Carpenters v. United States, 330 U. S. 395 ---- 18

Wisconsin Board v. United Auto Workers, 36 L. R. R. M. 2556 (Wis. Cir. Ct., 1955) ---- 23

Youngdahl v. Rainfair, Inc., 355 U. S. 131 ---- 15, 22

172 Ohio State 341 ---- 1

Texts.

Brissenden, *The Labor Injunction in Hawaii* 48 (1956) 13

"*Criminal Responsibility for Acts of Another*," 43 Harv. L. Rev. 689, 717 ---- 19

Frankfurter and Greene, *The Labor Injunction*, 79-80 (1930) ---- 14

Frankfurter and Greene, *The Labor Injunction*, 86-89 (1930) ---- 15

Frankfurter and Greene, *The Labor Injunction*, Ch. III ---- 18

Hopson, *Kansas Labor Law and District Court Injunctions*, 6 Kan. L. Rev. 1, 33-34 (1957) ---- 13

Labor Relations Reference Manual (Bureau of National Affairs, Washington) ---- 10, 16

45 LRRM *et seq.* ---- 11, 16

46 LRRM *et seq.* ---- 11, 16

47 LRRM *et seq.* ---- 11, 16

Seidenberg, *The Labor Injunction in New York City, 1935-1950*, 17 (1953) ---- 13

Seidenberg, *The Labor Injunction in New York City, 1935-1950*, p. 24 (1953) ---- 16

Seidenberg, *The Labor Injunction in New York City, 1935-1950*, 139, 146 (1953) ---- 15

State Court Injunctions, p. 5 ---- 11

State Court Injunctions, p. 17, and Table XI, p. 28 ---- 16

State Court Injunctions, p. 40 ---- 10

State Court Injunctions, p. 43 ---- 12

State Court Injunctions, p. 46 ---- 13

State Court Injunctions, p. 49 ---- 16

State Court Injunctions, p. 62 ---- 10

State Court Injunctions, pp. 94, 108 ---- 10

State Court Injunctions, pp. 94-5 ---- 11

State Court Injunctions, p. 100 ---- 12

State Court Injunctions, p. 101 ---- 16

Constitution of the United States.

Fourteenth Amendment 2, 9, 20, 21

Statutes.

Norris LaGuardia Act, Section 6 18

28 U. S. C. Sec. 1257(3) 1

29 U. S. C. Sec. 106, 41 Stat. 71 18

29 U. S. C. Secs. 157, 158, 159 22

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. _____.

CECIL DUNLAP and SAM POLLOCK,

Petitioners,

v.

THEODORE SPILKA,
Trustee in Bankruptcy,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

OPINIONS BELOW.

There was no opinion on the merits rendered by the Supreme Court of Ohio. That Court's dismissal of the appeal involved and refusal to certify the record is reported at 172 Ohio State 341, and is set forth in full in Appendix A hereto.

There was no reported opinion by the Court of Appeals of Cuyahoga County, Eighth Appellate District. That court's order is set forth in full in Appendix B hereto.

There was no reported opinion of the Court of Common Pleas of Cuyahoga County. That court's oral decision is set forth in full in Appendix C hereto.

STATEMENT OF JURISDICTION.

The order of the Supreme Court of Ohio was entered on May 10, 1961. There was no motion made for rehearing.

Jurisdiction of this Court is based upon 28 U. S. C. Sec. 1257 (3).

QUESTIONS PRESENTED.

1. Does the finding of guilt of contempt by a state court in a labor injunction case against union officers based solely on conduct of others violate the due process clause of the Fourteenth Amendment?

2. Does a finding of guilt of contempt by a state court against union officers for violation of a labor injunction decree that is vague, speculative, and indefinite violate the due process clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISION INVOLVED.

The only constitutional provision involved in this case is that portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States which reads as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

Two labor unions, Retail Store Employees Union Local 880, an affiliate of the Retail Clerks International Association, AFL-CIO, and Amalgamated Meat Cutters & Butcher Workmen of North America, Local Union 427, AFL-CIO, began a strike on March 1, 1956, against a retail food store in Cleveland, Ohio, known as Euclid Foods, Inc. Shortly after the strike began, the employer, Euclid Foods, Inc., filed an action in the Court of Common Pleas of Cuyahoga County, Ohio, seeking an injunction against the picketing. A temporary restraining order was issued on March 26, 1956 (which has remained a temporary restraining order to this day) restraining and

enjoining the two labor unions and their agents from numerous prohibited acts, and which limited picketing of the employer's establishment in certain specified ways.

Petitioner Cecil Dunlap is the chief executive officer of Retail Store Employees Union Local 880, hereinafter referred to as Retail Clerks, and petitioner Sam Pollock is the chief executive officer of Amalgamated Meat Cutters & Butcher Workmen of North America, Local Union 427, hereinafter referred to as Meat Cutters, and both were named as party defendants along with numerous other union agents and pickets in the injunction action. After setting forth various proscribed acts, the temporary restraining order of the Common Pleas Court contained the following crucial provision:

> "The defendants Sam Pollock and Cecil Dunlap shall have the right and privilege to visit the pickets there stationed and shall supervise and be responsible for such picketing."

Citations in contempt followed in the ensuing months of the strike, and on September 14, 1956, the plaintiff Euclid Foods, Inc. (later succeeded as a party plaintiff by Theodore Spilka, trustee in bankruptcy) filed amended and supplemental charges with a total of some twenty-six (26) specifications. Twenty-nine individuals, including Pollock and Dunlap, were ordered to show cause for alleged violations of one or more of these specifications. There were no specifications at all against either of the two defendant labor unions.

After setting forth 25 specifications, the last and 26th read as follows:

> "In the instances above mentioned, Sam Pollock and Cecil Dunlap failed and refused to supervise said pickets so as to require them to conform to the order of this Court."

Trial on all the charges was begun on October 1, 1956 and concluded on November 9, 1956. On 21 of the 26 specifications, the court ruled that plaintiff had not sustained its burden of proof and entered findings of not guilty. On Specification No. 3, an agent of the Meat Cutters was found guilty in that he physically assaulted and struck an employee of plaintiff. On Specification No. 6, eight agents of the two unions were found guilty of having violated that part of the court's order which prohibited picketing in numbers in excess of two and prohibited blocking of an entrance to a parking lot at the rear of plaintiff's premises. On Specification No. 7, an agent of the Meat Cutters was found guilty in that he physically struck and assaulted another employee of plaintiff. On Specification No. 16, defendant Pollock was found guilty of having engaged in picketing in violation of the order of the Court.

Regarding the convictions of Dunlap and Pollock, the only matters that are in issue here, the Journal Entry reads: "The Court further finds defendants Sam Pollock and Cecil Dunlap, and each of them, are guilty of having violated said order of this Court dated March 26, 1956, as set forth in Specification No. 26 of said amended and supplemental charges in that they, and each of them, failed in their responsibility to supervise said pickets in the above respects." Both men were fined the sum of $250.00 each, $50.00 of which was remitted.

From the specification and the Court's order, it is clear that the findings against Dunlap and Pollock were based solely on conduct of others. The 26th specification starts out by stating, "In the instances above mentioned," which means the 25 prior specifications applying to other persons (with the exception of Pollock, who was named in Specification No. 16 for a minor incident when he was

on the picket line). The Specification then recites, "so as to require them to conform to the order of this Court." Dunlap and Pollock were thus charged with contempt of court because some one else violated the decree and because they were under an order to "supervise" the picketing.

The Court's finding further emphasizes this point. After making the findings of guilt in the previous four specifications, the Court concluded that Dunlap and Pollock were guilty "in that they, and each of them, *failed in their responsibility* to supervise said pickets *in the above respects.*" (Emphasis supplied.) The term, "in the above respects," could only mean the four instances where findings of guilt were made, and further means that Dunlap and Pollock were found guilty solely because other persons may have violated the court decree.

It is important to point out that the trial court in no manner attempted to show that Dunlap and Pollock had engaged in any affirmative acts which would have been contemptuous, nor did it attempt to show that petitioners had in any knowing way or intentional manner failed to do anything that would properly be considered as necessary for compliance. The Court made no findings at all with regard to petitioners except that they had failed in their responsibility to supervise "in the above respects."

This reality is further emphasized by the record itself. Throughout the long contempt trial there was no evidence ever introduced into the record even to attempt to show that either Dunlap or Pollock was intentionally or unintentionally failing to carry out their duties as union leaders. There is not one word to show that petitioners counseled or aided or abetted in disobedience of the decree, there is not one word to show that they failed to take action on any incident brought to their attention, there is

nothing to show any kind of conduct on their part of a personal nature which might be considered contemptuous by any fair minded person.

The nature of the findings of guilt in the other four specifications, while not challenged here, illustrates the flimsiness of the findings against Dunlap and Pollock. Two of the four instances involved fist fights on the picket line between pickets and employees of the plaintiff food store. The record shows great provocation for these events, where employees cursed the pickets (R. 1285, 2233, 1288, 2240, 1442), and in both instances, the employees involved returned to the scene after having previously departed as if to deliberately provoke fights (R. 371, 391, 329, 325). The store was picketed throughout approximately fourteen hours each day seven days a week that it was open, and it was a physical impossibility for Dunlap and Pollock, each with numerous other union duties to perform, since both unions have collective bargaining contracts with hundreds of other employers in the food and retail industries in the greater Cleveland area, to be present at all times. The record will demonstrate that either of petitioners would have had to have been present at the exact spot at the exact moment the fights began and would have been compelled to have intervened physically with perhaps more force and brawling ability than either man possessed to break up or prevent bitter fights.

Specification No. 6 found eight persons guilty of picketing in excess of two and blocking entrances. Nowhere in the record is there any showing that either Dunlap or Pollock even knew of such occurrences. There is no showing that either was ever present during any such occurrences, and in fact, it is even extremely difficult to determine from the record when, and even if, such events ever occurred. The other finding of guilt against Pollock

involved two brief and minor incidents of carrying a sign, which Pollock readily admitted happened when pickets for personal reasons asked him to relieve them. While a finding of contempt based upon such conduct seems incredibly insubstantial, we do not here challenge this finding in any way. But in any event, Pollock ought not be found guilty twice for the same conduct.

The plight of the petitioner Dunlap makes the holding in this case almost ludicrous. Dunlap went on vacation around June 29, 1956, to the Pacific Coast, some three months after the issuance of the Court's order and did not return to Cleveland until around July 25, 1956. One of the fist fights occurred on July 1 and the other on July 3, while Dunlap was some two thousand miles away. While it is difficult to determine from the record when the excessive picketing and blocking occurred, there is some warrant for determining that this might have happened on July 3 and 4 (the only dates found in the record on these points), and on these occasions, Dunlap was two thousand miles away on his vacation. The Pollock incident occurred at other times, but Dunlap was not present.

While we submit the finding of contempt against Dunlap is on its face astonishing the wrongfulness of the finding against both petitioners is not the reason why review of this Court is sought, but rather the vast public importance of the issues presented, as we shall later set forth.

After conviction by the trial court, a motion for a new trial was made, was kept pending for some time, and was finally denied by order entered on June 12, 1959. An appeal was thereafter perfected to the Court of Appeals of Cuyahoga County, Eighth Judicial District, on all five of the findings of guilt on the five particular specifications. That Court affirmed the findings on all specifications without opinion, merely stating that "The Court finds no error

prejudicial to the Defendants-Appellants and therefore the judgment of the Court of Common Pleas of Cuyahoga County, Ohio is affirmed * * *." Petitioners thereafter filed an appeal as of right and a motion to certify the record in the Supreme Court of Ohio. After oral argument on May 5, 1961, the Supreme Court thereafter on May 10, 1961, dismissed the appeal as of right and denied the motion to certify.

HOW THE FEDERAL QUESTIONS WERE PRESENTED.

The federal questions were presented to the trial court during trial by motions of counsel for petitioners and other defendants involved for judgments of acquittal both at the conclusion of the plaintiff's case and at the conclusion of defendants' case. Arguments on these motions raised the defenses contained in the questions presented. These questions were further raised in argument on a motion for a new trial.

The federal questions were presented to the Court of Appeals for Cuyahoga County by written briefs and by oral argument when the case was on appeal to that tribunal.

The federal questions were presented to the Supreme Court of Ohio in petitioners' brief in support of motion to certify and appeal as of right, by specific enumeration and by oral argument at the hearing of the motion to certify and appeal as of right.

REASONS FOR GRANTING THE WRIT.

THE IMPORTANCE OF THE QUESTIONS INVOLVED CONCERNING PROPER DUE PROCESS STANDARDS FOR STATE COURTS IN LABOR INJUNCTION CONTEMPT CASES MAKE IT IMPERATIVE THAT THIS WRIT BE GRANTED.

This Court has never had occasion to pass upon what standards applied by state courts in labor injunction contempt cases conform to the requirements of due process of law of the Fourteenth Amendment.

Because labor injunctions are in widespread use in the state courts, because the scope of state restraining orders is often extremely broad, because contempt citations are of both frequent use and compelling nature, because the explicitness of constitutional standards ought to be applied in state courts, and because unchecked state court action can impose heavy restraints upon the national labor policy, it is respectfully submitted that this petition for certiorari ought to be granted. The ensuing review should establish guidelines for all state courts in all labor injunction cases in the future.

(a) The Widespread Use of Injunctions in Labor Disputes in State Courts.

As those labor attorneys who practice in the state areas are strikingly familiar, the use of the labor injunction in state courts is of common, frequent, and compelling occasion. To document its frequency in 1961 would be difficult, but reliable studies of a decade ago, in selected areas of the nation, have demonstrated its widespread use.

In Los Angeles County, California, alone, in the period from January 1946 to July, 1950, 263 labor injunction cases were filed in that jurisdiction, according to a report of the Sub-Committee on Labor Management Re-

lations of the Senate Committee on Labor and Public Welfare, S. Doc. No. 7, 82nd Cong., 1st Sess. (1951), entitled "*State Court Injunctions,*" (hereinafter cited as *State Court Injunctions*) at p. 40. This study, probably the most authoritative available anywhere in the United States concerning the incidences of state court labor injunctions, undertook to survey four areas of the country as examples to provide information to the Senate Committee for its use. Four universities were commissioned to make the study, University of California at Los Angeles, Cornell University, University of Wisconsin, and Duke University, and the four areas reported largely reflect the geographical locations of the participating institutions.

In ten southeastern states surveyed up to 1950, there were some 167 cases reported.[1] Incidences of labor injunctions were not as great in the midwestern states studied, but in two counties in New York City alone, in the period up to 1950, in all categories, injunctions amounted to 462.[2] These areas, of course, do not in any way comprise the entire nation, nor can the records be considered complete.

The inability to produce comprehensive figures for state court labor injunction activity since 1950 does not in any manner detract from the widely-known facts that such injunction actions are still occurring with great frequency. A cursory review of one of the leading labor reporting publications, Labor Relations Reference Manual (Bureau of National Affairs, Washington), reveals that for calendar 1960, there are reported cases of one kind or

---

[1] *State Court Injunctions,* pp. 94, 108.

[2] *State Court Injunctions,* p. 62.

another that reveal state court injunctions in 45 proceedings alone.[3]

None of the above figures takes into account the "evil of the unreported case." Professor Edwin E. Witte, who supervised the Congressional study cited above, concluded that his records, which are the most extensive existing, probably included less than half of all labor injunction cases. At that, his data included more unreported than reported cases.[4] The authors of one part of the study estimated that the ratio of unreported to reported cases was at least four to one and probably higher.[5] Counsel herein have found that many recent Ohio court injunction proceedings in which their participation has been had, and where injunctions were issued, involved unreported cases.[6] The instant case itself, has never been reported at any stage.

---

[3] These cases, some of them involving appellate review of wrongly issued injunctions, others involving contempt proceedings, and others involving various issues are found at the following citations: 45 LRRM 2664, 2688, 2729, 2759, 2761, 2763, 2795, 2828, 3002, 3033, 3135, 3193, 3196; 46 LRRM 2053, 2139, 2140, 2276, 2279, 2324, 2343, 2373, 2557, 2599, 2603, 2644, 2668, 2716, 2791, 2985, 3013, 3046, 3047, 3065, 3114, 3125, 3149; and at 47 LRRM 2036, 2156, 2206, 2270, 2344, 2487, 2500, 2501, 2503, and 2689. This list is not meant to be exhaustive in any manner.

[4] *State Court Injunctions*, p. 5.

[5] *State Court Injunctions*, pp. 94-5.

[6] *LaSalle's, a Division of R. H. Macy & Co. v. Retail Clerks Locals 128 and 633*, Court of Common Pleas, Lucas County, Ohio, No. 184121; *Lamson Brothers Co. v. Retail Clerks Locals 128 and 633*, Court of Common Pleas, Lucas County, Ohio, No. 184720; *Hardin and Helber v. Kornmiller, et al.*, Court of Common Pleas, Hocking County, Ohio, No. 12194; *Liberal Market, Inc. v. Retail Clerks Local 1552*, Court of Common Pleas, Montgomery County, Ohio, No. 118394; *International Longshoremen's Association vs. Weaver*, Court of Common Pleas, Cuyahoga County, Ohio, No. 749091; *Smith vs. International Longshoremen's Association, Local No. 1317*, Court of Common Pleas, Cuyahoga County, Ohio, No. 738780; *Lederer Terminal Warehouse, Inc. vs. International Brotherhood of Longshoremen, AFL-CIO*, Court of Common Pleas, Cuyahoga County, Ohio, No. 708768.

Projecting the Witte study's estimate (and we believe it to be unusually conservative), there would be approximately 225 state court labor injunction cases in 1960 alone. And these figures are asserted in the age of *Garner*,[7] *Guss*,[8] and *Garmon*,[9] where the state courts arguably retain only jurisdiction to enjoin conduct that would lead to violence or breach of the peace where the dispute involved affects interstate commerce. But a cursory examination of the cases cited for 1960 in Labor Relations Reference Manual will readily reveal that nearly all of them involve industries affecting commerce—which is still no deterrent to state courts issuing injunctions.

Not only are labor disputes plagued with the unreported case, which often allows error to go undetected, but there are other important considerations attached to state court injunctions that make their issuance a matter of great concern in the administration of justice in our federal system. Great numbers of these injunctions are issued by state judges in *ex parte* proceedings, and such orders carry with them the contempt power. The southeastern states study reveals that in 81 out of 105 cases, *ex parte* orders were issued.[10] In Los Angeles County, where the courts have made an attempt to reach known labor attorneys before issuing an injunction, it has been estimated that at least 50 per cent of the injunctions are issued *ex parte*.[11] For a modern example in Ohio of how

---

[7] *Garner v. Teamsters Union*, 346 U. S. 485 (1953).

[8] *Guss v. Utah State Labor Relations Board*, 353 U. S. 1 (1957).

[9] *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959).

[10] *State Court Injunctions*, p. 100.

[11] *State Court Injunctions*, p. 43.

the issuance of *ex parte* restraining orders can be abused by belligerent judges, see *In re Green*, 172 Ohio St. 269 (1961), which was also a matter involving interstate commerce.

Another consideration which attaches profound importance to the state court injunction in the labor case is that so many of these restraining orders are temporary, and never take on a final form (and consequently, are also unreported). In the Los Angeles County study, it was found that in only four out of 120 employer-plaintiff cases were permanent injunctions sought.[12] A study of labor injunctions issued in the four years immediately following World War II in Hawaii indicated that in no cases were permanent injunctions sought and that in less than one-half the cases were proceedings carried beyond the temporary restraining order to the issuance of a temporary injunction.[13] A study in Kansas revealed that in only eight out of 26 cases were permanent injunctions sought.[14] In New York City, where labor unions are far more advanced and likely to be far more pressing in pursuit of their legal rights, only 32 per cent of the employer-plaintiff labor injunction cases were carried beyond the preliminary stages, according to another study.[15] This very case, to this day, remains covered by a temporary restraining order, never made permanent.

The practical consequences of the temporary order, never appealed and never made permanent, are apparent to anyone with elementary knowledge of labor disputes.

---

[12] *State Court Injunctions*, p. 46.

[13] Brissenden, *The Labor Injunction in Hawaii* 48 (1956).

[14] Hopson, *Kansas Labor Law and District Court Injunctions*, 6 Kan. L. Rev. 1, 33-34 (1957).

[15] Seidenberg, *The Labor Injunction in New York City, 1935-1950*, 17. (1953).

Strikes can be quickly broken, morale of pickets dissipated, and enforced settlement under the injunction gun frequently may follow. It is noteworthy that conditions today have changed little from the times recorded by a member of this Court in his classic work, *The Labor Injunction,* Frankfurter and Greene, 79-80 (1930), where it was reported that "The strike—this is true in a great many of the cases—may have ended; the strikers may lack funds for litigation; the strikers may be convinced 'that there is nothing to be gained by fighting injunctions issued by judges who are hostile to organized labor.' Whatever the reason, it is undeniably the fact that the preliminary injunction in the main determines and terminates the controversy in court. The tentative truth results in making ultimate truth irrelevant."

Thus, it should be reiterated that the state court injunction in labor disputes is still a commonplace today, used with great frequency by state courts, that many of the orders are issued *ex parte,* and that most of them are "temporary" orders that are never made permanent, and great numbers of them are never appealed to higher courts. It is in this atmosphere that much of today's labor law is being made in state courts—unchallenged, unreviewed, unsung, and unchecked. "Law addresses itself to actualities," *Griffin v. Illinois,* 351 U. S. 12, 23 (1956). These are the actualities of labor law and life in the state court rooms in county seats all over America.

(b) The Sweeping Scope of the State Restraining Orders.

State court injunction decrees in labor disputes ordinarily take a broad and sweeping form. The original decree in this case is typical. It read,

> "Wherefore, it is ordered, adjudged and decreed that the defendants and each of them, their agents, employees, the members of the Unions herein involved, and all other persons to whom knowledge of this order shall come, be and until further order of this Court are restrained as follows:"

and thereafter follows a long number of prohibited acts, from interfering with ingress and egress of persons, limitations on how pickets should walk and where, from "advising, protecting, aiding, abetting or assisting any person or persons in the commission of the acts hereby restrained," and ordering Dunlap and Pollock, of course, to "supervise and be responsible for the picketing."

This Court, too, has seen many such decrees. Perhaps the state court order in *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131, set forth at 136, f.n. 4, is typical.[16] Several examples are provided in Seidenberg, *The Labor Injunction in New York City, 1935-1950,* 139, 146 (1953). The sweeping decree, affecting many persons, has been in common use for decades, Frankfurter and Greene, *The Labor Injunction,* 86-89 (1930).

Because such broad decrees, in common usage in state courts, affect so many persons, contain long recitations of prohibited acts, and carry with them the power of fine or imprisonment, it is important that every fundamental of due process of law be observed.

---

[16] "* * * the defendants * * * and each of them, and their agents and employees, and each and every one of the officers and members * * * and all other persons in sympathy, or acting in concert with them, be, and they are hereby permanently enjoined * * *" and thereafter following with a long list of proscribed acts of questionable nature.

(c) Contempt Is a Frequent Proceeding in State Courts in Labor Injunction Cases.

As state court decrees issue with great frequency in labor disputes cases, and contain prohibitions of numerous activities affecting many persons, the use of the contempt citation likewise is a matter of compelling importance. In only four of the southeastern states studied, Tennessee, North Carolina, Georgia, and Alabama, there were contempt citations in some 34 out of 102 cases where employers were plaintiffs.[17] While this was the largest number found, it undoubtedly reflects the difficulties of union organizing and some of the hostility of state courts in those jurisdictions to labor union efforts. In Los Angeles County, 11 out of 120 employer-plaintiff cases, or nine per cent, found contempt citations issuing.[18] In the midwestern states studied, there were 29 complaints and arrests for contempt out of 243 employer injunctions.[19] In New York, there was a much lower incidence, amounting to only about five per cent in employer-plaintiff cases.[20]

In the 1960 cases cursorily reviewed in the reports of Labor Relations Reference Manual, five of the injunction cases showed contempt proceedings of one form or another at various stages.[21] This, of course, does not even approach accounting for the numbers of unreported contempt citations that may have occurred. This case, as we have indicated earlier, is an illustration of how serious and prolonged contempt proceedings may never be reported, or brought to the attention of anyone.

---

[17] *State Court Injunctions*, p. 101.

[18] *State Court Injunctions*, p. 49.

[19] *State Court Injunctions*, p. 17, and Table XI, p. 28.

[20] Seidenberg, *supra*, p. 24.

[21] 45 LRRM 2729, 46 LRRM 2716, 3125, 47 LRRM 2239, 2487.

But the frequency of the contempt proceeding itself is only one measure of the efficacy of the state court injunction. Always in such a decree lies the threat of punitive sanctions imposed by the court. Always there lurks the possibility of a gruelling defensive ordeal that may sap the resources of the defendants. This case, again, affords an apt illustration. Some 29 persons were placed on trial in a proceeding that ran many weeks, and 21 of them were acquitted, but not without enduring the rigors of a trial that could have resulted in a fine or a jail sentence. Some of the same factors found decades ago relating to the force of the decree are still true today.[22]

Employers today can still marshal forceful implications from an injunction decree.[23] Respect of the average working man for the law and fear of becoming involved in judicial proceedings is a powerful deterrent to conduct that might even be considered as violative of a court decree. No one would attempt to underestimate the power of the contempt citation in the state courts.

---

[22] See Frankfurter and Greene, *supra*, p. 81. "Again, it is urged that the decree born of a chancellor's conscience 'is kinder than the club of the police,' better than 'doubtful results' in a criminal court. Presently it will be shown that such humility is neither wise nor kind, since it begs the most vulnerable charges against the injunction,—that the injunction includes more than the lawless; that it leaves the lawless undefined and thus terrorizes innocent conduct; that it employs the most powerful resources of the law on one side of a bitter social struggle."

[23] In one of counsel's own experiences in 1961, the employer reproduced copies of a state court injunction decree and mailed it to each of his more than 600 employees. *The Liberal Market, Inc. v. Retail Clerks Union Local 1552*, Court of Common Pleas of Montgomery County, Ohio, Case No. 118394. Copies of the decree were also posted on the doors of some 21 retail food stores. It was reported to counsel by union picket captains that supervisors and store officials constantly referred to the court decree, which prohibited various acts of threats and harassment, as a threat to prosecute pickets for conversing with customers. None of these events was ever reported in any kind of document.

(d) The Applicability of Due Process Standards.

1. The Federal Requirements.

Before turning to precise applications of the due process theories involved in this case, it might be helpful to consider the appropriate federal standards in labor injunction contempt proceedings. Section 6 of the Norris-LaGuardia Act, 41 Stat. 71, 29 U. S. C. Sec. 106, provides the starting point:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or a ratification of such acts after actual knowledge thereof."

This Court, in applying that provision, has confined it to a "guilt is personal" application in *United Brotherhood of Carpenters v. United States,* 330 U. S. 395, at 406-7.

We need not here attempt to reiterate the widespread abuses in the federal courts that led to the adoption of the Norris-LaGuardia Act and Sec. 6.[24] As far as we are able to determine, no such effort has been made to document the pattern of abuses of injunctive power in labor disputes in state courts. While we would assume that today's social attitudes in general concerning the role and status of the American labor movement have advanced greatly there still remains a great need to adhere to some regulatory guidelines for state courts. The facts of this case present an outstanding example of that need.

---

[24] That task was accomplished decades ago. Frankfurter and Greene, *supra,* Ch. III.

While the federal standards have been imposed by Congress through the medium of a statute, are they not merely a restatement of due process concepts? Are they not canons of fundamental fairness that all tribunals ought to follow? Do they not suggest the political ethic that we ought not have one standard in the federal judiciary and none at all for the state courts in a comparable area of endeavor? These inquiries are not meant, in themselves, to pose the due process questions in this case, but are rather intended to form a frame of reference in support of the applicability of the standards we seek. From this point, we turn to the two major due process questions we perceive in this case.

2. The Concept of Guilt as Personal.

"For it is the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual; and in the last analysis the inarticulate sub-conscious sense of justice of the man on the street is the only sure foundation of law." These wise words were written decades ago by Sayre, in *"Criminal Responsibility for Acts of Another,"* 43 Harv. L. Rev. 689, 717. These wise standards have been applied by this Court time after time.

One of this Court's most recent statements applying this principle was made in *Scales v. United States,* 81 Sup. Ct. 1469, 1484 (1961):

> "In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity, * * * that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment."

Scales, of course, involved a federal prosecution and an application of the due process clause of the Fifth Amendment. Under any kind of application of similar or equal meaning to the due process clause of the Fourteenth Amendment,[25] the same personal standard of guilt would be applicable to state prosecutions. Nor is it critical to this issue that the instant proceeding is one involving contempt of court rather than application of a state criminal statute. Fundamental standards of due process of law have been applied to federal statutes not criminal, but where penalties or forfeitures were involved, *Jordan v. DeGeorge,* 341 U. S. 223, 231 (1951). Where penalties or forfeitures are involved, as they are in this case, the states, too, should meet fundamental due process standards.[26] The "our jurisprudence" concept stated in *Scales, supra,* has a like application to the states.

The pertinent question set forth here at this stage might thus be restated: Should state courts in labor injunction contempt cases apply the due process of law standard that guilt is personal? We think the answer is affirmative without doubt. We also submit that the record in this case shows likewise without doubt that such a standard was not applied. Corrective application by this Court would be useful to all state courts dealing with contempt growing out of a labor injunction.

---

[25] Cf. *Tonawanda v. Lyon,* 181 U. S. 389; *French v. Barber Asphalt Paving Co.,* 181 U. S. 324; *Cass Farm Co. v. Detroit,* 181 U. S. 396.

[26] Under Ohio law, proceedings in contempt are treated as quasi-criminal in nature. *State v. Local Union 5760, United Steel Workers,* 172 Ohio St. 75, 83 (1961). The Ohio Supreme Court, in that proceeding, implied that it would be necessary to show, by clear and convincing evidence, that each defendant participated in the offensive acts charged. Even though such an implication may have been present there, it was totally ignored here, and the Ohio courts have not demonstrated by clear language that in any contempt proceeding, the concept of guilt as personal must be rigidly applied.

3. The Rule Against Vagueness.

In state criminal proceedings, state courts have long been required to avoid the rule against vagueness to meet the due process standards of the Fourteenth Amendment. *Lanzetta v. New Jersey,* 306 U. S. 451 (1939); *Herndon v. Lowry,* 301 U. S. 242 (1937). This Court has likewise applied the same standards to state contempt proceedings under the due process clause of the Fourteenth Amendment, *Scull v. Virginia,* 359 U. S. 344 (1959).

> "To sustain his conviction for contempt under these circumstances would be to send him to jail for a crime he could not with reasonable certainty know he was committing. This Court has often held that fundamental fairness requires that such reasonable certainty exist. (Citing cases.) Certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press and association for fear of violating an unclear law. Winters v. People of State of New York, 333 U. S. 507. Such is plainly the case here. The information given to Scull was far too wavering, confused and cloudy to sustain his conviction." 359 U. S. at page 353.

Scull's conduct involved alleged contumacious behavior directed toward a state legislative committee. Dunlap and Pollock's alleged contumacious behavior was directed against a court order involving picketing in a labor dispute. Conviction of either would fine or deprive a man of his liberty. The same standards must be applied to both.[27]

---

[27] "[W]e equally are bound by the first principles of justice not to sanction decrees so vague as to put the whole conduct of the defendants at the peril of a summons for contempt," said Mr. Justice Holmes in *Swift & Co. v. United States,* 196 U. S. 375, 396, (1905).

(e) Unregulated State Court Action Can Impose Great Restraints Upon the National Labor Policy.

There is a further consideration in this case concerning the national labor policy, even though the proceeding here is one within a state court. The legal issue of state court jurisdiction to dispense injunctions in labor disputes affecting interstate commerce has been well settled with the confinement of state jurisdiction to the areas of violence and police power.[28] In this permissible area of the state decree, it is fundamentally important that limitations not be imposed in excess of the state's authority. While federal labor policy may protect the right of peaceful picketing and similarly related activities, the state court decree restraining violence, mass picketing, and violations of the public peace ought not be either so broadly drawn or so rigidly enforced as to act as a restraint upon the peaceful picketing that is otherwise lawful.

This is the critical issue insofar as the national labor policy is concerned. The greater number of state court injunctions in labor disputes will quite naturally involve industries affecting interstate commerce.[29] In each instance where a state court by injunctive order imposes some restraints on union picket line activity, even though

---

[28] *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131 (1957); *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959).

[29] There are several reasons why this is likely. First of all, the national statute with its encouragement of collective bargaining as a national policy, provides legal protection for labor unions to organize employees in industries affecting commerce, 29 U. S. C. Secs. 157, 158, 159. Because there is federal legal protection, there is likely to be more organization in industries affecting commerce than in industries that do not affect commerce where there are no state laws affording legal protection for the right to organize and bargain collectively. Ohio presents an example of a state with no kind of legal protection for the right to organize and bargain collectively in intrastate industries.

(Continued on following page)

permissible, there is, to that extent an added burden to the union's exercise of a federally protected right. This Court, in deciding questions concerning the national labor policy as drawn by the Congress through its legislation, must be vigilant that the national policy, otherwise given judicial protection through the federal supremacy clause, not be vitiated, chipped-away, or hampered by *improper* state decree. When state orders overstep bounds of judicial propriety, they have in addition imposed an improper sanction against the free play of the national labor policy.

One lower state court sensed this problem in an opinion which applied the same kind of due process standards we seek in this case. In *Wisconsin Board v. United Auto Workers*, 36 L. R. R. M. 2556 (Wis. Cir. Ct., 1955), in a contempt proceeding growing out of the Kohler strike, the court noted:

> "To hold that persons occupying such positions are responsible for any or all transgressions on the part of the members of a labor union involved in industrial strife would be manifestly unfair. If labor leaders are to be found guilty of contempt of court merely because some member of union (sic) violates a court's injunction the ultimate result would be that decent, law-abiding men would refuse to accept positions of leadership in labor unions and that the leadership of American labor would soon fall in the hands of irresponsible opportunists." 36 L. R. R. M. at 2559.

(Continued from preceding page)

Other reasons are that the major industries likely to attract union organization are engaged in interstate commerce by their very size and nature. In addition, the standards applied by the National Labor Relations Board for asserting jurisdiction over industries affecting commerce reach all but the very small intrastate enterprises.

It is submitted that only a negligible few of the state court injunctions today would be issued in industries not reached by the national labor policy.

If state courts may impose duties upon union officers to "supervise" picket lines and punish them for contempt when any wayward picket becomes embroiled in a fight with a picket-line antagonist, then the only real protection a union officer could have would be to supervise the picket line out of existence with no picketing at all. This would be a highly unwarranted restraint on the national labor policy of peaceful picketing in interstate labor disputes. If union officers can be held accountable on accusations so vague they can not discern their meaning, then their only safety lies in surrender, their freedom rests upon servile obedience beyond what the decree might require, and their wisest course would be total abandonment of their union efforts.

(f) The Great National Importance of the Issues Presented Overwhelmingly Supports the Granting of the Writ.

The fate of Cecil Dunlap and Sam Pollock as individual union officers is of minor consequence alongside the importance of the national issues presented, even though their right to due process of law is as precious to them as to any other citizen. In demonstration of the importance of these issues, we have attempted to set forth that the state court injunction in labor disputes is a powerful element in recurring disputes between labor and management throughout the nation. It is employed frequently and widely, with decrees that often have sweeping applicability.

These state court injunctions are often issued *ex parte* against labor unions, without notice or hearing, as we have shown, and their violation can be punished by fine or imprisonment. Many of them are labeled "temporary," and are never appealed to higher courts, thus often imposing binding adjudications upon the litigants without

the opportunity of meaningful appellate review. In this context, the contempt power is of even greater importance, for this is the implement of enforcement of the widespread state court labor injunction. It is important not only in the cases where it is actually used, but in every case where a decree is entered, for in every such case, the contempt power itself is the veritable sword of Damocles over the head of every man who walks the picket line.

We submit the standards of due process of law of the Fourteenth Amendment must be applied to these state court proceedings. In this particular case, it can hardly be questioned but that Dunlap and Pollock were convicted and fined solely for acts done by others and upon an order that was so vague and speculative that no fair-minded man could fathom its ultimate force. No one can say with exactitude what "supervise" means in relation to a picket line as used by the state court in this proceeding.

Twenty years ago, in sanctioning a state court injunction restraining violent conduct in a labor dispute, an opinion of Mr. Justice Frankfurter stated, in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, at 298:

> "If an appropriate injunction were put to abnormal uses in its enforcement, so that encroachments were made on free discussion outside the limits of violence, as for instance discussion through newspapers or on the radio, the doors of this Court are always open."

In this case, an otherwise appropriate injunction (which has never been contested) has been put to an abnormal use in its enforcement so that encroachments have been made on the personal freedom of union officials so as to limit their rights of peaceful picketing, and we do, therefore, indeed seek the opening of the doors of this Court to correct this abnormal use. But another import-

ant consideration stated in the *Meadowmoor* opinion has impressive pertinence here, too, at 312 U. S. 287, 296:

> "In the exceptional cases warranting restraint upon normally free conduct, the restraint ought to be defined by clear and guarded language. According to the best practice, a judge himself should draw the specific terms of such restraint and not rely on drafts submitted by the parties. But we do not have revisory power over state practice, *provided such practice is not used to evade constitutional guarantees.*" (Emphasis added.)

While we appreciate that this Court has no revisory powers over state practice in itself, here constitutional guarantees have been evaded by the conviction of two union officials solely for acts committed by other persons upon a decree too vague to meet any kind of constitutional standard.

As stated earlier, this Court has had no opportunity in the twenty years since *Meadowmoor, supra,* or at any other time, to review charges of abnormal uses of state court injunction decrees in labor disputes. This matter is of fundamental and overwhelming importance to the American labor movement and to each and every union official and union member in the country, and to Cecil Dunlap and Sam Pollock, whose property is being taken away from them by this "abnormal use." The facts in this case focus particularly upon the two most likely areas of state court injunctive abuse—the holding of union officers responsible for picket line conduct they are powerless to control, and holding union officials under pain of punitive sanctions under decrees so vague as to be almost meaningless. This case provides an admirable vehicle for reviewing state standards in labor injunction cases.

CONCLUSION.

For all the reasons above set forth, it is respectfully submitted that this petition for writ of certiorari ought to be granted.

Respectfully submitted,

JOSEPH E. FINLEY,
METZENBAUM, GAINES, SCHWARTZ,
KRUPANSKY, FINLEY AND STERN,
700 Union Commerce Building,
Cleveland, Ohio,

MORTIMER RIEMER,
SMOOT AND RIEMER,
2141 Illuminating Building,
Cleveland, Ohio,

Attorneys for Petitioners.

APPENDIX A.

Spilka, Trustee, Appellee, v. Retail Stores Employees Union, Local No. 880, et al., Appellants.

(No. 36996—Decided May 10, 1961.)

Appeal from the Court of Appeals for Cuyahoga County.

The appeal as of right herein is dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C. J., ZIMMERMAN, TAFT, MATTHIAS, BELL, RADCLIFF and O'NEILL, J.J., concur.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of HERBERT, J.

APPENDIX B.

Journal Entry of the Court of Appeals.

No. 24,982.

COURT OF APPEALS OF OHIO,

EIGHTH DISTRICT, COUNTY OF CUYAHOGA.

THEODORE SPILKA,
Trustee in Bankruptcy for Euclid Foods Inc., an Ohio Corp. Bankrupt,
Plaintiff-Appellee,

vs.

RETAIL STORES EMPLOYEES UNION LOCAL 880, RETAIL CLERKS INTERNATIONAL ASSN., AFL-CIO; AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL UNION 427, AFL-CIO *et al.,*

Defendants-Appellants.

JOURNAL ENTRY.

Jan. 25, 1961:

This cause came on to be heard on the appeal on question of law from the judgment of the Court of Common Pleas of Cuyahoga County, Ohio and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the Defendants-Appellants and therefore the judgment of the Court of Common Pleas of Cuyahoga County, Ohio is affirmed and it is ordered that Plaintiff-Appellee recover of Defendants-Appellants his costs herein taxed.

The Court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court of Cuyahoga County to carry this judgment into execution.

JOY SETH HURD,
Presiding Judge.

APPENDIX C.

Decision of the Court of Common Pleas.

No. 681,664.

IN THE COURT OF COMMON PLEAS.

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

EUCLID FOODS, INC.,

Plaintiff,

vs.

RETAIL FOOD CLERKS, LOCAL 880; RETAIL CLERKS INTERNATIONAL ASSOCIATION,

Defendants.

DECISION OF THE COURT.

December 2, 1956.

ARCHER, *J.:*

Gentlemen, in the hearing of this case we have consumed some 23 or 24 days of actual trial, and have heard some fifty witnesses. The court has taken numerous notes and a lot of time in reviewing my notes, and in reviewing the evidence and the testimony of the witnesses. The court has also read all of the cases which have been cited by counsel for both plaintiff and defendants. And may I at this time commend both the attorneys for the plaintiff and the defendants for the manner in which you presented your evidence, and for your comportment during this lengthy trial.

There is no doubt in the court's mind that there were many utterances and many threats made during the time of this strike, which could not be considered peaceful picketing; that there were many foul, filthy, profane and obscene remarks.

There is no doubt that roofing nails were distributed in the vicinity of these premises, and that numerous flat tires were caused by these roofing nails.

There can be no doubt that there were provocations for many of the incidents related and recited from the witness stand.

There can be no doubt that pickets did stray outside the 48 foot limitation prescribed in the order of the court, or that pickets did stray from the sidewalks onto the apron of the store front.

However, the court is fully aware that the evidence must be clear, positive and convincing, and the court is of the opinion that the evidence pertaining to the above mentioned matters does not prove a violation by any particular defendant.

Upon consideration, however, of the pleadings, the evidence and the arguments of counsel, the court does find that Frank Cimino, Charles Maneage, Donald Rogers, William Rettig, Michael Koeber, David McDonald, Wilbur Rogers and Daniel DeSantis, are guilty of violating the order of this Court, as set forth in Specification 6, in that they have participated in picketing in excess of two, and that they have blocked the entrance from 81st Street into the parking lot.

It is the sentence of this Court that each of the defendants be fined the sum of $25; that said fine is hereby suspended, provided that said defendants do not further engage in a violation of the order of this Court during the continuance of the strike.

The court further finds that Frank Cimino has violated said order of the court, as set forth in Specification 7, and that said Frank Cimino is hereby ordered to pay a fine in the sum of $25, and that said fine is hereby sus-

pended, provided that said Frank Cimino does not further engage in violation of the order of this Court for the duration of the strike.

The court further finds that Charles Maneage has violated the order of this Court, as set forth in Specification 3, and it is the sentence of this Court that Charles Maneage pay a fine of $25, and that said fine is hereby suspended, provided the said Charles Maneage shall not further engage in violation of the order of this Court during the strike.

It is further found by the court that the defendant, Sam Pollock, violated said order of the court in that he did picket, as set forth in Specification 16, and it is the order of this Court that the said Sam Pollock pay a fine of $25, and that said fine is hereby suspended for the duration of this strike, provided the said Sam Pollock does not engage further in acts violating the order of this Court.

It is the further finding of this Court that the defendants, Sam Pollock and Cecil Dunlap, failed in their responsibility to supervise said pickets, and it is the sentence of this Court that the said defendants, Sam Pollock and Cecil Dunlap, each pay a fine of $250, and that each pay one-half of the cost herein.

Exceptions are hereby saved to all parties adversely affected.

As to the motion concerning the discontinuance of the reports of pickets, the same is hereby overruled, and the defendants will continue, until further order of the court, to transmit to the clerk of the court in Room 1, statements containing the names of pickets, as set forth in the journal entry of the court.

Exception may be noted to the overruling of the motion.

Office-Supreme Court, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 291.

CECIL DUNLAP and SAM POLLOCK,
Petitioners,

v.

THEODORE SPILKA,
Trustee in Bankruptcy,
Respondent.

RESPONDENT'S REPLY BRIEF.

WELLES K. STANLEY,
1270 Union Commerce Bldg.,
Cleveland, Ohio,
Attorney for Respondent.

STANLEY, SMOYER & SCHWARTZ,
1270 Union Commerce Bldg.,
Cleveland, Ohio.

SEYMOUR R. BROWN AND ARMAND I. COHN,
DANACEAU, COHN & BROWN,
1220 Huron Rd.,
Cleveland, Ohio,
Of Counsel.

TABLE OF CONTENTS.

Question Presented 1

Statement of the Case 2

Argument 4

Conclusion 12

Appendix A. Journal Entry of the Court of Common Pleas 13

TABLE OF AUTHORITIES.

Cases.

Oil Workers International Union v. Superior Court of Contra Costa County, 103 Cal. App. 2d 512; 230 P. 2d 71 10

San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959) 8

State of Ohio v. Local Union 576, United Steelworkers of America et al., 172 O. S. 75 10

United Construction Workers et al. v. La Burnum Construction Corp., 347 U. S. 656 (1954) 8

United States v. Brotherhood of Railroad Trainmen, 95 F. Supp., 1019 10

United States v. United Mine Workers of America, 330 U. S. 258 10

Wisconsin Board v. United Auto Workers, 36 L. R. M. 2556, Wis. Cir. Ct. 1955 ..... 9, 10

Youngdahl v. Rainfair, Inc., 355 U. S. 131 (1957) 8

Constitution.

Constitution of the United States:
Fourteenth Amendment ---------- 2

Statutes.

Norris-La Guardia Act, 41 Stat. 71, 29 U. S. C. Sec. 106 ---------- 6

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 291.

CECIL DUNLAP and SAM POLLOCK,

Petitioners,

v.

THEODORE SPILKA,
Trustee in Bankruptcy,
Respondent.

RESPONDENT'S REPLY BRIEF.

QUESTION PRESENTED.

Before entering upon the constitutional arguments of the Petitioners, the Respondent takes objection to the wording of the questions presented at the top of page 2 of the Petition. The question should read as follows:

When, during the course of a violent strike carried out jointly by two unions, a state court, to protect the peace and security of the citizens of the community, specifically forbids certain acts to be continued in the future by the presidents of both unions (Petitioners herein) and specifically orders such presidents to do certain acts, and, upon it being determined that such officers have deliberately disobeyed such orders of such court with the result that further violence has occurred and the peace and security of the community has been violated and the state court finds the officers to be in contempt, and imposes fines upon them, have the rights of such officers under Section 1, of the 14th Amendment of our Constitution been in any way violated?

The questions presented by the Petitioners are worded so as to create an inference that the Petitioners were found guilty of contempt because of the conduct of the pickets on the picket line, which conduct violated the Court's order; when in fact, as will be set forth hereafter, the record is clear that acts of commission and omission by the Petitioners brought about the finding of guilty of contempt against them.

Petitioners ask for a Writ of Certiorari on the claim that their rights under Section 1 of the 14th Amendment of the Constitution have been violated by the ruling in the contempt proceedings in the Court of Common Pleas of Cuyahoga County, Ohio. Respondent denies that such violation exists and denies that the finding in the trial court presents any constitutional issue for this Court's consideration.

STATEMENT OF THE CASE.

At the inception of the events involved herein, there existed in Cleveland, Ohio, a small independent so-called Super-Market at 8115 Euclid Avenue. While the business was in the form of a corporation, Euclid Foods Inc., all of its shares were owned by Mrs. Elizabeth Bondi, who, together with her husband and a few clerks, operated the store. All employees were members of either the Retail Store Employees Union Local 880, AFL-CIO or Amalgamated Meat Cutters and Butcher Workmen of North America Local 427, AFL-CIO. On March 1, 1956 both unions, of which Petitioners are, and were, the respective presidents, began a so-called "strike" that was to last for thirteen months and which ended with the bankruptcy of Euclid Foods, Inc.

Because of the extreme violence that attended this "strike," Euclid Foods filed an action against both unions.

The cause is No. 681,664 of the Court of Common Pleas of Cuyahoga County, Ohio, and the petition asked for a temporary restraining order, injunction and equitable relief. Upon hearing, the Court granted a temporary restraining order which is set forth as Appendix A herein.

Subsequently, Euclid Foods Inc. filed Amended Supplemental Charges in Contempt against the unions and the Petitioners based upon an alleged violation of the temporary restraining order. The trial on these issues lasted 23 days, during which time the Court received the testimony of some 50 witnesses and examined a large number of exhibits, including depositions and photographs. At the conclusion of this trial the Court rendered its decision on December 2, 1956 which is set forth as Appendix C in the Petition.

The Petitioners appealed this decision to the Court of Appeals for the Eighth Judicial District of Ohio, which affirmed the judgment of the Court of Common Pleas.

The Petitioners then appealed to the Ohio Supreme Court, which dismissed the appeal as of right for the reason that no debatable constitutional question is involved. These decisions are set forth in Appendices A and B of the Petition.

ARGUMENT.

It is necessary, at this point, to review the contents of the restraining order of the Common Pleas Court. The attention of this Court is directed to Item 4, of the Common Pleas Court's order, in which the Court identifies the picketing area, and permits certain numbers of pickets to be stationed at certain locations. Immediately following the quoted paragraph found on page 3 of the Petition, which is a part of Item No. 4 of the Court's temporary injunction, there appears a significant paragraph: "However, neither of these two defendants (Petitioners herein) named shall picket."

Because of the violence which accompanied the picketing from the out-set in this case, the Common Pleas Court, in making its order, put the burden upon the officers of the Union to make sure that this violence did not continue. This was the reason for making Pollock and Dunlap responsible for "such" picketing; and this was the reason for absolutely enjoining Pollock and Dunlap from taking any active part in the picket line. In fact, the very presence of a leader on the picket line, under the circumstances involved in this case, was conducive to giving the other pickets courage to carry on their violent conduct.

The Petitioners' major argument seems to be that the Court of Common Pleas' restraining order is vague and indefinite and that it follows a pattern of injunctions across the country, reported and unreported, which is hectic; and that this Court should certify this case as a vehicle for reviewing State standards and labor injunction cases.

It is important to analyze the wording of this order. Pollock and Dunlap were given the *right* and *privilege* to visit the pickets. The order established that Pollock and

Dunlap, as union leaders, have the right and privilege to visit the pickets on the picket line. The Court uses the words "there stationed," to indicate that the right and privilege were limited to the specific locations where the Court permitted pickets to be stationed. Pollock and Dunlap cannot argue that they did not know, or were not apprised of the right and privilege they had to visit the pickets at the picket post. The Court has spelled this out for them. But, if the Petitioners had the right and privilege to visit the pickets at their station, they also had corresponding duties to perform. These duties are spelled out in the Court's order as follows: "* * * and shall supervise and be responsible for *such picketing.*" The Lower Court tells the Petitioners that this supervision and responsibility is confined to "*such picketing.*" Obviously, the Court is referring to the picketing which it permitted in items 3 and 4 of its Journal Entry. (Emphasis added.)

The Court's order could not be more clear. Furthermore, there is nothing in the entire record of this case to indicate that these Petitioners ever requested the Court of Common Pleas to clarify or explain any part of its order. Certainly, if the Petitioners had always felt that such orders were unclear or vague (as they now claim) they could and should have asked for such clarification. But Pollock and Dunlap have failed to do this, and they have failed to do anything to indicate that they were uncertain in any degree as to the exact meaning of such orders.

The meaning of "to be responsible for" and "supervise" are of such common knowledge as to require no further definition. The Petitioners argue that no one can say with exactitude what "supervise" means in relation to a picket line as used by the State Court in this proceeding. The word is clear and must be read with reference to the entire order of this Court.

The folly of Petitioners' position is that they have come into this Court with unclean hands, having engaged in violent conduct, having induced others to participate in it actively, and having participated in it themselves; and argue that this Court should certify this case because it points up a State Court injunctive abuse, in holding Union officers responsible for picket line conduct they are powerless to control; and holding Union officials under pain of punitive sanctions, under decrees so vague as to be almost meaningless.

The Common Pleas Court never found Pollock and Dunlap guilty of contempt of Court because a "wayward" picket became embroiled in a fight with a picket-line antagonist, or because of the conduct of the pickets, over which they had no control.

Specification No. 26 charges that Pollock and Dunlap "failed and refused to supervise said pickets so as to require them to conform to the order of this Court." In other words, Pollock and Dunlap were charged with failing and refusing to make sure that the pickets picketed according to the order laid down by the lower Court. This is simple and clear.

The Petition sets forth on page 18, Sec. 6 of the Norris-La Guardia Act, 41 Stat. 71, 29 U. S. C. Sec. 106:

> "No officer or member of any association, or organization and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any Court of the United States for the unlawful act of individual officers, members, or agents, *except upon clear proof of actual participation in, or actual authorization of, such acts, or a ratification of such acts after actual knowledge thereof.*" (Emphasis added.)

Indeed, it seems as if the Norris-La Guardia Act as cited above were written with this case in mind.

Specification No. 16 of the Amended and Supplemental Charges charged Sam Pollock with picketing the plaintiff's premises and carrying a picket sign on certain specific occasions. The Court of Common Pleas found that Sam Pollock had violated its order and that he did picket, as set forth in that specification.

Testimony received at the time of trial clearly proves that Pollock in fact, carried a picket sign and participated in the picketing. Nick Bondi, the store manager, testified (R. 779) that Pollock was taking pictures of the customers coming out of the store. He stated (R. 780): "One day he took a picture of a customer getting into their car." Bondi also testified, "He told them they shouldn't cross the picket line. When people cross picket lines, they take a chance of losing their own employment * * *." (R. 780.) Pollock was 3 or 4 feet away from Nick Bondi when Pollock said this to the customer. (R. 797.) Nick Bondi identified, from a photograph marked plaintiff's Exhibit 32, Sam Pollock, who was shown carrying a picket sign on Sunday, August 5, 1956. Bondi testified that Pollock was standing out front, walking back and forth, talking to the people who were walking by. (R. 798.)

On (R. 812), Bondi testified about a conversation he had with Pollock at the E. 81st St. entrance to the parking lot of the Euclid Foods Market. Bondi complained about signs being torn, and he states that Pollock replied, "There will be more than that torn. You are lucky you don't get your damn neck or back broke." On (R. 687), Mrs. Elizabeth Bondi, who was the President of the employer, testified that plaintiff's Exhibit 30 was a photograph of Pollock lifting a picket sign he was wearing to avoid being photographed. Mrs. Bondi said she took him by surprise, that he didn't want to be photographed wearing a picket sign, and that is why he picked up the sign.

There can be no doubt that the charge against Pollock under Specification No. 16 was proved clearly and convincingly to the Common Pleas Court. Pollock was found guilty under Specification No. 16. Petitioners have not included that specification to be reviewed in this petition, however.

The Petitioners on page 22 of their petition, cite *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131 (1957) and *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959) for the proposition that State Courts have jurisdiction to enjoin picket line conduct which amounts to violence and a breach of the peace, where the dispute affects inter-state commerce, under the State's police-power. The order of the Common Pleas Court in this case follows that rule. Violence was prevalent in this case. Indeed, it was the violent conduct of the pickets and the threat to personal safety of customers, employees and management which led the Court of Common Pleas to restrain the Unions from in any way, *except by peaceful means*, utterances, writings and persuasion from interfering with the ingress and egress of any person to or from the plaintiff's store. And also from assaulting or abusing with vile or indecent language or threatening with physical violence, any of plaintiff's customers; to induce, or attempt to induce said customers not to enter plaintiff's store. (Emphasis added.) It is difficult to understand petitioners argument on page 22 of its Petition, which suggest that the restraining order in this case was so broadly drawn or so rigidly enforced as to act as a restraint upon peaceful picketing.

In *United Construction Workers et al. vs. La Burnum Construction Corp.*, 347 U. S. 656 (1954), this Court held:

> "To the extent that Congress prescribed preventative procedure against unfair labor practices, conflicting

> state procedure to the same end is excluded. But, to the extent that Congress has not prescribed procedure, for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that *existing criminal penalties*, or liability for tortious conduct has been eliminated * * *. The denial of jurisdiction to the State Court in this case would mean that where the Federal Preventative Administrative procedures are impotent or inadequate, the offenders by coercion of the type found here, may destroy property without liability for damages." (Emphasis added.)

State Courts have the right to enjoin conduct that endangers the peace and security of the citizens of the community. State Courts have the further right to grant temporary injunctions and permanent injunctions against threatened future conduct that would irreparably damage a plaintiff, and against which resulting injuries plaintiff would have no adequate remedy at law.

The fact that injunctions granted in labor cases are unreported does not affect the right of a state to secure the peace and security of its citizens against unrestrained violence by unions, nor does such fact impair a citizen's right to injunctive relief against such unions.

The fact that such injunctive decrees remain part of unreported cases means only that some defendant-unions have not seen fit to appeal the decision granting the injunction, nothing more.

The Petition cites *Wisconsin Board v. United Auto Workers,* 36 L. R. R. M. 2556 Wis. Cir. Ct. 1955, a contempt proceeding growing out of the Kohler strike, in which the Court stated that: "If labor leaders are to be found guilty of contempt of court merely because some member of the Union (sic) violates a Court's injunction, the ultimate result would be that decent law-abiding men

would refuse to accept positions of leadership in labor unions and that the leadership of American Labor would soon fall into the hands of irresponsible opportunists." 36 L. R. R. M. 2559. Once again the petitioners have attempted to lead this Court into believing that they were found guilty of contempt because some member of their union violated the Court's injunction.

The Ohio Supreme Court in the case of *State of Ohio v. Local Union 576, United Steelworkers of America et al.*, 172 O. S. 75, at page 85, uses the following language:

> "The responsibility of union officials also has been well stated, as follows, by the Court of Appeals of California:
>
> '* * * The duly constituted officers and committees of the union, clothed with general authority to conduct the strike * * * cannot in good conscience, with knowledge of the restraining order and its provisions and early advice thereon by their attorney, withhold from the members, particularly those assigned to picket duty, adequate information concerning acts enjoined by the restraining order. Those members were not acting merely on their own. They were acting for the union as an organization and would quite naturally *look to their captains for guidance* as well as for station assignments.' " (Emphasis added.)
>
> *Oil Workers International Union v. Superior Court of Contra Costa County*, 103 Cal. App. 2d 512, 570, 571; 230 P. 2d, 71.

On page 84 of *State of Ohio v. Local Union 576, United Steelworkers of America, et al.* (*supra*) the Court citing *United States v. United Mine Workers of America*, 330 U. S. 258; and *United States v. Brotherhood of Railroad Trainmen*, 95 F. Supp., 1019 states:

> "The interest of orderly government demand that respect and compliance be given to the orders issued by Courts possessed of jurisdiction over subject matter and over litigants. One who defies public authority, be that one an unincorporated association of laboring men, or an individual, or a corporation, and who willfully disobeys a court order must pay the penalty."

The petitioners were found guilty because of their own failure to supervise and their own failure to be responsible for the picketing, Pollock by many acts of commission, and Dunlap, by acts of omission. Dunlap was aware of the Court's order, he knew of the violence accompanying the picketing, which resulted in this Court's order, and he failed to supervise the pickets' activities so as to make them conform to peaceful picketing.

Petitioners argue at great length the "overriding social implications" of injunctions in labor cases; they have used this tactic consistently throughout the history of this case as an excuse for their failure to argue the case on its merits. The question that Petitioners attempt to raise here is whether or not *their* constitutional rights have been violated; they are not really interested in anything else, including the possible effect of injunction on the penurious labor unions in any of the 50 states, including Hawaii.

CONCLUSION.

For the reasons set forth herein the Petition should be denied.

Respectfully submitted,

WELLES K. STANLEY,
Attorney for Respondent.

STANLEY, SMOYER & SCHWARTZ,
1270 Union Commerce Bldg.,
Cleveland, Ohio,

SEYMOUR R. BROWN AND ARMAND I. COHN,
DANACEAU, COHN & BROWN,
1220 Huron Rd.,
Cleveland, Ohio,
Of Counsel.

APPENDIX A.

Journal Entry of the Court of Common Pleas.

No. 681,664.

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

EUCLID FOODS, INC.,

Plaintiff,

vs.

RETAIL FOOD CLERKS LOCAL 880,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
AFL-CIO

Defendants.

JOURNAL ENTRY.

March 26, 1956.

This cause came on to be heard for an order pendente lite in accordance with Plaintiff's petition. Upon the evidence offered by all parties and the argument of counsel, the Court being fully advised in the premises finds that an order pendente lite should issue.

Wherefore, it is ordered, adjudged and decreed that the defendants and each of them, their agents, employees, the members of the Unions herein involved, and all other persons to whom knowledge of this order shall come, be and until further order of this Court are restrained as follows:

1. From in any way, except by peaceful means, utterances, writings and persuasion, interfering with the ingress and egress of any person to or from Plaintiff's store.

2. From assaulting or abusing with vile or indecent language or threatening with physical violence any of Plaintiff's customers to induce, or attempt to induce said customers not to enter Plaintiff's store.

3. From causing or permitting pickets to enter upon Plaintiff's property either in front of its store or upon its parking lot.

4. Except as later specifically permitted in this paragraph, from engaging in picketing, stationing pickets, entering or gathering upon the sidewalk upon the northerly side of Euclid Avenue between East 82nd Street and East 81st Street or upon the easterly sidewalk of East 81st Street between Euclid Avenue and the northerly side of the entrance to Plaintiff's parking lot. However, upon the northerly portion of said sidewalk on Euclid Avenue for a distance of forty-eight (48) feet, which is in front of Plaintiff's store, two (2) pickets may be stationed. Also two (2) pickets may be stationed upon the easterly sidewalk of East 81st Street between Euclid Avenue and the northerly side of the entrance to said parking lot, and one (1) picket may be stationed on the sidewalk at either side of the Euclid Avenue entrance to said parking lot who shall picket only there.

The defendants Sam Pollock and Cecil Dunlap shall have the right and privilege to visit the pickets there stationed and shall supervise and be responsible for such picketing.

However, neither of these two defendants named shall picket.

Neither of the two groups of pickets permitted above shall walk abreast upon the sidewalks nor otherwise impede any person desiring to use the sidewalks.

Each of said five (5) pickets shall wear or carry a picket sign.

5. From advising, protecting, aiding, abetting or assisting any person or persons in the commission of the acts hereby restrained.

Bond for this order pendente lite is fixed at $1,000.00 which has been executed, filed and approved.

To all of the above the Defendants except.

PARKER FULTON,

Judge.